UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

SES Terminal, LLC	)	**Docket No. CP04-58-000, et al.**

ANSWER OF SES TERMINAL, LLC
TO MOTIONS FOR SUMMARY DISPOSITION
AND IMMEDIATE STAY

On March 1, 2007, Long Beach Citizens for Utility Reform ("LBCUR"), Coalition for a Safe Environment ("CFASE"), and CAlifornians for Renewable Energy ("CARE") (collectively, "Movants") filed a Motion for Summary Disposition and a Motion for Immediate Stay (collectively, "March 1 Motions") of the application filed by SES Terminal, LLC ("SES") for authorization to construct and operate an LNG import terminal in the Port of Long Beach, California ("POLB"). Pursuant to Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"), 18 C.F.R. § 385.213, SES files its Answer. SES respectfully submits that the motions are without merit and should be denied.

The March 1 Motions are based upon a January 22, 2007 decision ("January 22 Decision") of the POLB Board of Harbor Commissioners ("BHC") which purported to disapprove the SES project, refuses to complete the Environmental Impact Report ("EIR"), and determines not to pursue further negotiations with SES concerning the LNG terminal. The March 1 Motions seek essentially the same relief, and for the same reasons, advanced in a previous motion filed by one of the Movants, CARE, urging the Commission to terminate the SES application because of the January 22 Decision

("CARE's Initial Motion"). In SES's response to CARE's previous motion,[1] SES advised the Commission that SES had initiated litigation in a California state court requesting the court to set aside the January 22 decision, and direct the POLB to prepare a final EIR prior to any action to either approve or disapprove the LNG project. In light of the legal remedies being sought by SES to reverse the decision of the BHC, SES requested the Commission to deny CARE's Initial Motion, to continue to process SES's application, and to issue a final Environmental Impact Statement ("EIS") as soon as possible.

Movants offer no reasons, other than those previously urged by CARE, to justify a Commission order summarily disposing of SES's application, or for staying further processing of it. Rather the bulk of Movants' arguments focus on their assessment of the merits of the state court litigation and do so by attempting to explain, justify, or support the decision of BHC. These arguments involve the interpretation of agreements under California state law, policies and procedures of the City of Long Beach, and the requirements of a California statute – the California Environmental Quality Act ("CEQA"). Such issues are entirely within the subject matter of SES's Petition for Writ of Mandate now pending in the Superior Court for the State of California, County of Los Angeles, Case No. BS107298. Respectfully, that California court, not this federal Commission, is the proper forum to resolve these issues.

[1] *Answer of SES Terminal, LLC to Motion for Termination of Proceeding of Californians For Renewable Energy, Inc."*, (SES Answer) filed on February 8, 2007.

I. BACKGROUND

The basis of the pleadings filed by CARE and the Movants is BHC's January 22 Decision. Two days later, on January 24, CARE's Initial Motion[2] was filed urging the Commission to terminate SES's application on the ground that it had been rendered "incomplete" by the January 22 Decision. In its Answer, filed February 8, SES informed the Commission that SES had filed a petition in California Superior Court requesting the court to vacate the January 22 Decision, and mandate that POLB complete the EIR. Also on February 8, SES responded to a letter from the Director of the Office of Energy Projects which asked why FERC should continue to process the application in light of the January 22 Decision.[3] SES advised the Director of the Office of Energy Projects that in light of the state court litigation, the BHC's determination to "disapprove" the project could not be regarded as definitive or final, and until a definitive ruling has been made, SES requested FERC to continue to process the pending application, including the issuance of the final EIS as soon as possible.

Subsequently, the Movants filed the instant March 1 Motions, requesting the Commission to summarily dispose of and immediately stay the SES application because of the January 22 Decision. Movants repeat CARE'S initial contention that BHC's action renders the SES application incomplete because that decision deprives SES of a site for its project. The Movants also contend that the SES application is no longer a "proposal"

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[2] *Motion for Termination of Proceeding of CAlifornians for Renewable Energy, Inc. (CARE) to Sound Energy Solution's Incomplete Application* ("Initial Motion"), January 24, 2007.

[3] *Letter from SES Terminal, LLC, to Mark Robinson, Director of the Office of Energy Projects,* February 8, 2007 ("SES Letter").

as defined by the National Environmental Policy Act (NEPA)[4] and should therefore be dismissed.[5]

II. ARGUMENT

A. Procedural Issues

Although styled as motions for summary disposition and stay, the March 1 Motions seek basically the same procedural relief on the same grounds as CARE's Initial Motion. The March 1 Motions should, therefore, be viewed as either an impermissible answer to an answer or an impermissible attempt to supplement the Initial Motion. The March 1 Motions' impropriety is evidenced by their assertion that the Movants "believe SES' Answer and Reply are non-responsive to CARE's Motion and the Director's Request, and we believe BHC's January 22 decision is definitive …."[6] Whether viewed as an answer to an answer or a supplement to a prior motion, the March 1 Motions are barred by the Commission's regulations, and should be dismissed on these procedural grounds alone.

In addition, the Summary Disposition request in the March 1 Motions consists of statements, arguments and conclusions based solely on Movants' information and belief. No supporting affidavits are attached. Thus, the March 1 Motions are supported by nothing more than the Movants' opinions concerning Movants' assessment of the merits of the SES state court lawsuit. As noted above, however, the issues in SES's suit involve California state and municipal law, and local procedures and requirements. The Commission has no authority to decide such issues at all and, if it did, it should not

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[4] 40 C.F.R. § 1508.23 (2006).

[5] *Motion for Summary Disposition of Long Beach Citizens for Utility Reform, Coalition for a Safe Environment, CAlifornians for Renewable Energy, Inc.*, p. 3 (filed March 1, 2007).

exercise it on a summary basis. Such issues must be resolved in the pending state court litigation.

Finally, the March 1 Motions are predicated on a complete misapprehension of the issues presented in this docket. Movants assert that "[b]ecause FERC has posted no delegated orders, notational votes or notices on the matter within 30 days of CARE's filing (close of business February 23, 2007), we deem CARE's Motion denied [20 CFR § 590.312]." This is simply wrong. CARE's motion has not been denied and remains pending before the Commission. Nothing in the Natural Gas Act ("NGA")[7] or the Commission's regulations[8] requires the Commission to decide motions within 30 days or any other deadline. Movants erroneously rely on 10 C.F.R. § 590.312, but that provision is not only inapplicable to this proceeding, it has no application at all to this Commission. Rather, it applies to proceedings of the Office of Fossil Energy in the Department of Energy concerning applications for authorization to import or export natural gas. The Commission's Rules of Practice and Procedure do not require the Commission to decide procedural motions like CARE's within a specified time period.

B. Substantive Claims

The Movants' principal argument is that the January 22 Decision was lawful and definitive, and that the SES lawsuit cannot overturn that decision. In fact, the March 1 Motions are devoted almost exclusively to a detailed critique of, and response to, the SES California lawsuit. For example, Movants suggest that the California lawsuit, even if successful, can do nothing more than require BHC to "cure procedural and reporting

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[6] *Id.*
[7] 15 U.S.C. 717n (b) (2000) (rules of procedure).
[8] 18 C.F.R. Part 385 (2006).

errors".[9] Such an issue is for the California courts to decide, although SES intends its suit to do far more. The California lawsuit is designed to compel the POLB to honor its contractual commitments, fulfill its statutory obligations under CEQA, and prepare and certify a final EIR.

The March 1 Motions list eight reasons why the January 22 Decision is definitive.[10] Only two of those reasons present issues that arguably might fall within the Commission's jurisdiction. The claims concerning BHC's and POLB's failure to comply with CEQA alleged by SES in its Petition for Writ of Mandate in Los Angeles Superior Court are obviously matters entirely and exclusively within state court jurisdiction. So are the contract issues and damage claims. Only two issues are arguably within the Commission's responsibilities: whether FERC may and should complete its NEPA review and whether the BHC action "terminated SES' rights to the POLB site".

The Movants' argue, under NEPA, that because of the January 22 Decision, SES's application is no longer a "proposal" as defined by NEPA, and therefore warrants no further NEPA review. However, as the SES lawsuit clearly demonstrates, the January 22 Decision is not final or definitive. SES's FERC application, as well as numerous other applications for permits and other authorizations, remain outstanding. Therefore, FERC can, and should, continue to process the SES application under the NGA and, in particular, exercise its authority as the lead agency under NEPA to issue a final EIS on the project.[11] FERC and POLB had initially agreed to prepare a joint environmental

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[9] *Motion for Summary Disposition*, p. 4.
[10] *Motion for Summary Disposition*, p. 3.
[11] Energy Policy Act of 2005 §313(b), 119 Stat. 594, 689 (2005) (designation of the Commission as the lead agency for NEPA review); *see also, Sound Energy Solutions*, 106 FERC ¶ 61,279 P 33 (2004) ("The Commission will be the lead agency in conducting [NEPA] review and be responsible for preparing the environmental analysis").

report to satisfy the requirements of both NEPA and CEQA. As a result of the January 22 Decision, SES is contending in its state court action that the preparation of an EIR for the project under CEQA has been unlawfully abandoned. FERC's statutory obligations under the NGA and NEPA, however, are derived from federal law and are independent of POLB's obligations under CEQA. Therefore, FERC's NEPA and NGA responsibilities continue while the state legal issues concerning POLB's CEQA obligations are decided in the pending state court litigation.

Importantly, Movants are also incorrect that the January 22 Decision somehow conclusively terminated SES' rights to the POLB site. As SES has more fully explained in its Answer to CARE's Initial Motion, SES has filed a Petition for a Writ of Mandate under CEQA to compel POLB to complete the EIR process pursuant to California Pub. Res. Code § 21167. That litigation is specifically designed to compel resumption of the CEQA process, which SES believes will lead to a favorable EIR; that outcome, in turn, will provide the basis for POLB and SES to enter into a lease for the site. In light of this state court proceeding, the determination by BHC to "disapprove" the project cannot be regarded as definitive, and until a definitive ruling has been made, FERC should continue process the pending SES application. For that reason, SES has requested that FERC sever the EIS from the EIR, and issue a final EIS, as part of its responsibilities under NEPA.[12] In no event, however, should FERC allow itself to be drawn into the state law controversies whose resolution will determine whether the January 22 Decision is lawful and definitive.

[12] SES Answer, pp. 1, 11-13.

C. CEII

Movants have also maintained that on several occasions, during the pendancy of the SES application, the Commission has changed its Critical Energy Infrastructure Information ("CEII") regulations, and that the state and municipal agencies that have permitting authority over the project have been denied access to CEII necessary for them to fulfill their duties under state law. This is simply not true. Neither meaningful changes to the CEII regulations have occurred since the project's inception nor have any state or local authorities been denied access to CEII pursuant to those regulations. Contrary to Movants' claims, there is no conflict with "decision-makers' fiduciary obligations and state laws".[13] Further, there is no evidence that a lack of CEII information played any role in the BHC decision, or impeded POLB's review under CEQA, since POLB has had full access to all CEII in the application. Finally, Movants themselves concede that any conflict between CEQA and the CEII regulations is pending before the California court.[14]

To the extent that Movants contend that the Commission has failed to provide necessary safety information to the relevant state and local agencies, such information has been released pursuant to a non-disclosure agreement, as previously explained in SES's Answer to the Initial Motion. The treatment of such information by the state agencies is, of course, subject to the preemptive federal requirements.[15]

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[13] *Motion for Summary Disposition*, p. 17.
[14] *Motion for Summary Disposition*, p. 16.
[15] As stated in the Petition for Writ of Mandate, BHC has improperly justified its decision to abandon completion of the final EIR on the ground, among other things, that CEQA requires full disclosure of the CEII contained in the EIR to the public. Petition for Writ of Mandate, Para. 4. National security laws prohibit both FERC and the United States Coast Guard from releasing certain sensitive security and energy related information to be reviewed by the public. CEQA does not require full disclosure, and, to

D. Motion for Immediate Stay

In the event that FERC denies the Motion for Summary Disposition, the Movants request an immediate stay of the proceeding pending the outcome of legal actions between the parties.[16] Elsewhere, Movants appear to request a stay if the Commission denies CARE's Initial Motion.[17] Neither of those events has occurred, however, and until one or both of those events occur, there is simply nothing to stay. Even if the Commission were to deny the Initial Motion and/or the Motion for Summary Disposition, neither event would cause irreparable injury to Movants sufficient to warrant a stay of the further processing of SES' application.[18] The Commission may decide to issue a final EIS which, in and of itself, causes no equitably cognizable injury to Movants. Moreover, even if the Commission were to then issue an order approving the SES application under NGA Section 3, that order would be subject to rehearing. Furthermore, any final Commission order would be only a conditional authorization under which no construction may be commenced until SES obtains numerous state and federal authorizations and approvals. Thus, there would be no immediate adverse impact on Movants which would warrant a stay.

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the extent that there is a conflict between CEQA and these national security statutes, federal law would preempt CEQA in this context.

[16] *Motion for Immediate Stay*, p. 3.

[17] *Motion for Summary Disposition*, p. 5.

[18] The Commission may stay its action "when justice so requires." In considering motions for stay the Commission considers: (1) whether the moving party will suffer irreparable injury without a stay; (2) whether issuing the stay will substantially harm other parties; and (3) whether the stay is in the public interest. Further, the Commission recognizes "irreparable injury" as the key element. *See, e.g., MidAmerican Energy Holdings Co.*, 118 FERC ¶ 61,003 at P 22 (2007); and *Pacific Gas and Electric Co.*, 117 FERC ¶ 61,294 at P 62 (2006).

E. Contract Dispute

In the Motion for Summary Disposition, Movants contend that "[a]t its core, this is a contract dispute."[19] In the Motion for Immediate Stay, Movants assert that "[b]y its request that FERC continue processing the application and issue a Final EIS independently of BHC's local lead agency review, SES has essentially asked FERC to insert itself into a California contract dispute and use its permitting authority to influence the outcome."[20] Just the opposite is true. By Movants' arguing about the merits of the BHC decision and the SES lawsuit and asking FERC to dispose of the SES application on those state law claims, it is Movants — not SES — who are seeking to involve FERC in a "California contract dispute." SES has appropriately raised all questions of state law in California state court, and has not asked FERC to insert itself in these matters which are pending in a California proceeding. SES has simply asked FERC to exercise its responsibilities under NEPA and the NGA.

WHEREFORE, for the reasons stated herein, SES respectfully requests that the Commission deny both the Motion for Summary Disposition and the Motion for Immediate Stay.

Respectfully submitted,

/s/ Julia R. Richardson

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[19] *Motion for Summary Disposition*, p. 20.
[20] *Motion for Immediate Stay*, p. 3.

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a copy of the foregoing document to be served upon each person designated on the official service list compiled by the Federal Energy Regulatory Commission in this proceeding.

Dated this 15th day of March 2007.

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